UNITED STATES
v.
A. E. KOTTINGER ET AL.

IBLA 73-238 Decided November 27, 1973

Appeal from decision of Administrative Law Judge Graydon E. Holt in mining contest S-2915.

Affirmed.

Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Discovery: Marketability

In order to demonstrate a discovery on a placer sand and gravel claim located before July 23, 1955, it must be shown that the material could have been extracted, removed and marketed at a profit as of July 23, 1955, and without substantial interruption in the market up to the present time.

Administrative Procedure: Burden of Proof--Mining Claims: Discovery: Marketability--Rules of Practice: Appeals: Burden of Proof

Where the preponderance of the evidence in a contest hearing does not show the existence of a reasonably continuous profitable market for a common variety of sand and gravel from a mining claim, from 1955 to the time of the hearing, the claimants have failed to show a discovery.

Mining Claims: Contests--Mining Claims: Hearings--Rules of Practice: Appeals: Generally--Rules of Practice: Evidence--Rules of Practice: Hearings

Evidence tendered on appeal after a hearing in a contest against a mining claim cannot be used in rendering a decision on appeal; such evidence of a recent sale of sand and gravel from the claim and a possible change in the market can only be used to determine whether a new hearing should be ordered.

APPEARANCES: A. E. Kottinger, for contestees; Donald R. Kennedy, Esq., of Lopez, Kennedy & Srite and Jack Halpin, Redding, Calif., for contestees at the hearing; Charles E. Lawrence, Esq., Office of the General Counsel, U.S. Department of Agriculture, San Francisco, Calif., for contestant.

OPINION BY MRS. THOMPSON

A. E. Kottinger, J. E. Kottinger, M. N. Thompson, and J. S. Jensen have appealed to the Secretary of the Interior from an Administrative Law Judge's decision dated December 6, 1972, invalidating the claimants' Four Partners placer mining claim and rejecting their mineral patent application S-2915 for that claim. 1/

The Four Partners claim is situated in the S 1/2 NE 1/4 Sec. 6, T. 40 N., R. 4 W., M.D.M., in Siskiyou County, California, within Shasta National Forest. It is three and a half miles northwest of the city of Mount Shasta and six miles south of Weed. It was located in 1950 for sand and gravel, and the patent application was filed March 31, 1970. The claim originally comprised 80 acres, but approximately 20 acres have been lost to road and railroad rights-of-way (Ex. 8).

The Bureau of Land Management initiated this contest at the request of the Forest Service by a complaint filed December 17, 1971. The contestant alleged: (1) there has been no discovery made on the claim, neither now nor as of July 23, 1955; and (2) the land is non-mineral in character. In a decision dated December 6, 1972, the

1/ The Judge also rejected a patent application for the Three Partners claim (Contest No. S-2914) and declared the claim -- a sixty-acre association claim south of and contiguous to the Four Partners, located by Bessie Kottinger, Greta Kottinger, and Gladys Jensen -- to be null and void. As no appeal was taken from his decision as to that claim, it has become final.

Administrative Law Judge invalidated the claim on findings of no present marketability, and lack of a timely discovery of a valuable mineral deposit.

In order to be entitled to a patent to the claimed lands, the claimants must show that they have met the requirements of discovery set out in Castle v. Womble, 19 L.D. 455, 457 (1894), and approved in Chrisman v. Miller, 197 U.S. 313, 322 (1905), that minerals have been found of such a character that:

> * * * a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * *.

Under the prudent man test, the claimants must show that the mineral in question can be extracted and marketed at a profit. United States v. Coleman, 390 U.S. 599 (1968). The rationale for the marketability test and its criteria are set forth in Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959):

> With respect to widespread non-metallic minerals such as sand and gravel, however, the Department has stressed the additional requirement of present marketability in order to prevent the misappropriation of lands containing these materials by persons seeking to acquire such lands for purposes other than mining. Thus, such a "mineral locator or applicant, to justify his possession, must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit." * * * [Solicitor's Opinion], 54 I.D. 294, 296 (1933), emphasis supplied. See also Estate of Victor E. Hanny, 63 I.D. 369, 370-72 (1956).

The Act of July 23, 1955, 69 Stat. 368, 30 U.S.C. § 611 et seq. (1970), withdrew deposits of common varieties of sand and gravel from location under the mining laws. As the claimants did not show that the claim contains any uncommon variety of sand and gravel or other locatable mineral, they were required to show a valid discovery of the sand and gravel under the marketability test as of July 23, 1955. Barrows v. Hickel, 477 F.2d 80, 82 (9th Cir. 1971); Palmer v. Dredge Corp., 398 F.2d 791, 795 (9th Cir. 1968), cert. denied 393 U.S. 1066

(1969); United States v. Clear Gravel Enterprises, Inc., 2 IBLA 285, 291 (1971), aff'd, Clear Gravel Enterprises, Inc. v. Keil, Civil No. LV-1654 (D. Nev. May 4, 1972), appeal pending.

They were also required to show a "reasonably continuous" market from July 23, 1955, to the present. As stated in United States v. Charleston Stone Products, Inc., 9 IBLA 94, 100 (1973): 2/

> [T]he contestee must also establish that in the interval from the date of the withdrawal of common varieties of sand and gravel from mineral location to the date of the contest proceedings a market for the * * * mineral has continued without any prolonged interruption * * *. [I]f the marketability of the common variety mineral for which the claim was located is lost, the validity of the location is similarly lost * * *. United States v. Estate of Alvis F. Denison, 76 I.D. 223 (1969); Mulkern v. Hammit, 326 F.2d 896 (9th Cir. 1964). [L]ater recovery of a profitable market cannot serve to resuscitate such invalid claims.

At the hearing the evidence showed that the only sizeable market for sand and gravel from the claim was the California State Highway Department, which has used the material for road surfacing, asphaltic concrete, concrete aggregate, and base (Tr. 40). From 1952 to 1954, the Highway Department made a purchase of approximately 88,880 tons of unprocessed material at a three and a half cents per ton royalty, for a payment, according to the claimants' records, of $2,967.67. During this period the highway construction contractor moved its equipment onto the claim to process the sand and gravel needed for the job. When the project was completed in 1954, the contractor sold the claimants its surplus production, which was stockpiled on the claim.

The district engineer for the State Highway Department testified that there was no continuous state highway project in the area, so that there was no continuous market for sand and gravel for highway purposes (Tr. 50). After the second sale to the Highway Department of 26,512 tons of unprocessed gravels at three and a half cents per

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2/ Judicial review of the Charleston case has been sought. Charleston Stone Products Co., Inc. v. Morton, Civil No. LV-2039-BRT, currently pending before the United States District Court for the District of Nevada.

ton in 1955, for $927.92, there was almost no digging in the pits for seven years. The third and most recent sale to the Highway Department was for 116,064 tons of unprocessed material at a royalty of five cents per ton over the period 1962-1965, for $5,803.20. From 1965 until the 1972 hearing there were no sales of material in place. The State Highway Department operated its own sand and gravel pit for its most recent construction, thereby eliminating itself as a market.

The contestant showed by the testimony of appellant A. E. Kottinger that without a highway project the major part of the market is lost:

> Q. Now, the extension of that market is contingent upon there being a highway project; is that right?
>
> A. Yes, to get any big sales.
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> Q. I mean no highway project, no market; Is that right?
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> A. That's about it. (Tr. 83).

With this and other evidence (e.g., Exhibit 9), the contestant made a prima facie showing of lack of discovery. The burden of proof then shifted to the claimants to establish by a preponderance of the evidence the validity of the discovery. Foster v. Seaton, supra; United States v. Winters, 2 IBLA 329, 339, 78 I.D. 193, 197 (1971). For the reasons discussed below, the Board finds that the claimants have failed to meet this burden of proof.

The evidence showed that not only were sales from the Four Partners pit few and far between, but that the market these sales supplied was very sporadic. During the years between sales to the Highway Department, the claimants would have been hard put to demonstrate the "existence of present demand," a key element of marketability under Foster v. Seaton, supra, for unprocessed material in place on their claim. In these years, the claimants made almost all of their sales of sand and gravel from the 11,000-ton stockpile of processed material bought from the state highway contractor in 1954, until the stockpile was exhausted in 1971 (Tr. 96). This processed material, which was bought for $1,500 in 1954, was sold

for a gross return of $15,504.95 over a 16-year period. Approximately $1,950.00 of that gross represented delivery charges paid to the claimants. 3/

The Judge held at page 5 that the existence of this small market for the processed surplus, which the claimant had purchased as merchandise, was entitled to "almost no weight." He relied in part on the failure of the record to show whether the material was sold at a price that would have returned the claimants a profit had it not been acquired by the fortunate occurrence of the contractor's overproduction.

While the claimants assert numerous points of error, their central assertion is that the sales from the 11,000-ton stockpile evidenced a real market the existence of which should not be discounted because of the claimants' "business acumen" in repurchasing the contractor's overproduction.

The claimants' "business acumen" is not in issue here. While they realized a profit on this transaction, the issue is whether that profit reflects the type of marketing situation which a prudent man could reasonably anticipate for the materials from the claim. While other questions arise concerning claimants' reliance on the sales of the purchased processed material, it is unnecessary to discuss them. At most, it suffices to point out that the processed material is not representative of the material in place. Any evaluation of the sales of such material must consider the enhancement in value due to the changed character of the material because of the processing, and the costs of such processing.

The processed materials sold at prices from $1.00 to $2.85 (when delivered) per cubic yard, and from $1.00 to $2.45 per ton, compared with the royalty value for material in place of three and a half to five cents per ton paid by the Highway Department. This

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3/ These and other production statistics have been extracted from Exhibit 9 and Appellants' Supplemental Accounting [hereinafter referred to as Accounting]. This accounting is contained in pages 7-26 of Contestee's Memorandum of Points and Authorities. Because of the number of errors in the accounting exhibits introduced at the hearing it was stipulated that this supplemental accounting be made part of the record (Tr. 130-1).

would be a gross to the claimants of $385 to $550 for 11,000 tons, if unprocessed, in contrast to the gross of $15,504.95 for the processed material, including delivery charges paid to claimants. The difference reflects the enhancement in value due to the processing. In the normal course of business the claimants would have had to absorb the costs of crushing, processing and sorting the material. There was no evidence to indicate that these costs would have been less than the return from the sale of the materials. Even disregarding the costs of equipment and other operating expenses, their gross, including delivery charges, still amounted to only $912.05 per year. 4/ The processed material has all been sold. Appellants have not shown evidence which would justify an expectation of a profitable operation in other processed material from the claim.

The sales of processed material in this case are inconclusive to establish that such material could be profitably marketed under normal business circumstances. The profit from the stockpile of processed material in the 13 years when no material was being dug from the pits does not by itself show a reasonable prospect of success in developing the mine. In United States v. Harper, 8 IBLA 357 (1972), the Board invalidated a lode mining claim which the claimant showed could be operated at a very small profit. The Harper rationale applies here. The test is objective; a prudent man would not develop a mine which promised a profit below the return for a commercial venture. United States v. Coleman, supra; Barrows v. Hickel, supra at 83; United States v. Melluzzo, 76 I.D. 181, 192 (1969); Atchison, Topeka & Santa Fe Ry. Co. v. Cox, 4 IBLA 279 (1972).

In any event, the market for processed material was not reasonably continuous itself. The claimants' records show no sales of any kind for a three-year period -- March 1957 to June 1960. The fact that the sales made in 1966 and 1968 were for base, fill and leach line uses, which have been held not to be validating

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4/ The record shows that Mount Shasta Sand and Gravel Company, one of the two other private operations in the area, was owned by appellants Jensen and Thompson from 1946 to 1967 (Tr. 69). The effect of this interest in the Mount Shasta Sand and Gravel Company on the timing and quantity of sales from the Four Partners claim was not explored at the hearing.

uses, further shows the weakness of the market. 5/ United States v. Barrows, 76 I.D. 299, 306 (1969), aff'd, Barrows v. Hickel, supra; United States v. Hinde, A-30634 (July 9, 1968).

The small sales, the lack of production, the years without any sales or any validating sales, combined with the lack of evidence of demand for the material, all demonstrate that the processed material market in the Mount Shasta area was too insignificant to support a discovery under the prudent man test. Since the market from 1956-1962 and from 1966 on would not support a finding of discovery, claimants have failed to show a reasonably continuous market under Charleston Stone Products, supra.

The evidence showed, as the claimants recognized, that the demand for pit production depended on a state highway project. Each highway construction contract was the entire market during the course of the project, and the claimants could not plan on the occurrence of future highway projects nor on getting those contracts if the projects materialized. The sporadic and unreliable nature of this market compels the conclusion that even while operating with a highway construction contract -- 1952-54 and during 1955 -- the claimants could not show a reasonable prospect of success in developing a paying mine. The claimants failed to meet their burden of proof that development of the Four Partners claim would have resulted in a profitable commercial venture. United States v. Lease, 6 IBLA 11, 30-31, 79 I.D. 379, 388 (1972); Foster v. Seaton, supra.

Much of the testimony at the hearing was devoted to the issue of whether a present market for material from the Four Partners claim exists. The appellants' second ground of appeal is that the Judge erred in finding no present marketability. Due to the finding above, resolution of this point is not controlling. It is discussed only in order to answer some of the claimants' other assertions on appeal.

It was not disputed that the construction of Interstate Highway 5 would soon begin between the towns of Mount Shasta and Dunsmuir and that the material for the road would have to be supplied from somewhere in the Mount Shasta area. The supply of material for recent Interstate 5 construction north of Mount Shasta has come from the state-owned pit

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5/ The claimants' accounting record does not show that all of the other sales were for validating uses. The discussion assumes that they were.

known as Black Butte (Tr. 40). Testimony on the issue of marketability as of the time of the contest revolved around the future of this pit. A. W. Hislop, District Engineer of the State Highway Department, testified that the State was closing down the Black Butte pit because of strong objections from environmentalists to the highly visible white scar the operation created across the flank of Black Butte (Tr. 41-2). The Department was searching for another source for the large supplies it needed. 6/

The Judge held at page 6 that "there was no evidence that the state is going to use material from the Four Partners. In the absence of a willing buyer * * * to whom the contestants can reasonably be expected to sell at a profit, there is no present marketability * * *." Appellants argue, however, that as one of the three working pits in the area 7/ their claim is a prime source of the needed materials, that is, they have a "reasonable prospect" of success in supplying the Highway Department's demand.

Claimants in their appeal seek to support their assertion of marketability as of the date of the hearing by tendering for the first time the following evidentiary matters: (1) that they have offered the State Highway Department an option to obtain 205,000 cubic yards of gravels at 12 cents per cubic yard for the Mount Shasta to Dunsmuir Interstate 5 project; (2) that two other highway jobs (raised as possibilities at the hearing [Tr. 57]) are now good prospects for the sale of 210,000 cubic yards of materials; and (3) that they made a recent sale of 12,682 tons for a royalty of $2,572.40, asserted in their letter to this Board dated September 1, 1973.

However, such "evidence" cannot be used in rendering a decision. The hearing record constitutes the exclusive record for decision. 5 U.S.C. §§ 556-557 (1970); 43 CFR 4.24(a). Evidence tendered on appeal from a judge's decision can only be used in determining whether a further hearing is necessary. United States v. Gunn, 7 IBLA 237, 253, 79 I.D. 588, 595-96 (1972); United States v. Winters, supra at 342-43. If the case turned on the issue of present marketability these assertions might raise a plausible

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6/ This fact was verified after the hearing (Decision at footnote 7).

7/ In their appeal brief (at 2) the appellants say they are one of the two working private pits in the area, apparently referring to themselves and Mount Shasta Sand and Gravel Company as one.

argument for remand, 8/ except for the rule that prospective sales in a prospective market will not support a discovery. Barrows v. Hickel, supra at 83; United States v. Hinde, supra. However, our finding that there was not a reasonably continuous profitable market from 1955 to the time of the hearing renders a further hearing unnecessary.

Appellants assert a number of other sources of error in the evidence received at the hearing. None of this is relevant to the grounds on which the case is decided, and is thus not relied upon. Therefore, any alleged error would not support reversal. See Safeway Stores v. F.T.C., 366 F.2d 795, 803 (9th Cir. 1966); Yiannopoulos v. Robinson, 247 F.2d 655, 657 (7th Cir. 1957). Similarly, the exclusion of certain testimony not related to the grounds on which the case is decided was not prejudicial to the claimants.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Judge in contest S-2915 is affirmed.

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Joan B. Thompson, Member

We concur:

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Martin Ritvo, Member

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Douglas E. Henriques, Member

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8/ United States v. Wedertz, 71 I.D. 368, 374 (1964); see United States v. Winters, supra.